mesne profits to the plaintiff. The plaintiff is clearly entitled to the rents of the sub-tenants for the period of the holding over. The defendant became a trespasser as from 1st November 1966 and accordingly he must hand over to the plaintiff all rents that he has collected from the subtenants in respect of the period commencing 1st November 1966 up to the date of this judgment. He is entitled to keep all rents collected by him in respect of any period before 1st November 1966. In the absence of the parties coming to some agreement on the amount due in respect of *mesne* profits there shall be an enquiry before the Registrar who shall ascertain and certify the amount that has been collected by the defendant from the sub-tenants in respect of the period 1st November 1966 to date of this judgment. There shall be judgment for the plaintiff for the sum so certified by the Registrar less the amount which the defendant may have paid to the plaintiff by way of rent in respect of the same period.

Judgment for the plaintiff.

Solicitors: *Williams & Tennakoon; L. A. J. Smith.*

MALAYSIAN REPORTS

LAM YET HONG & ANOR. v. TAN HUI KHENG

[O.C.J. (B.T.H. Lee J.) January 9, 1971]

[Kuching — Civil Suit No. K98 of 1968]

Probate and Administration — Administration of estates — Chinese custom — Will — Whether rule against perpetuities applies in Sarawak — Posthumous adoption — Declaration of disinheritance — Succession on intestacy under Chinese custom — Limitation — Limitation Ordinance — Administration of Estate Ordinance (Cap. 80), s. 17.

The plaintiffs brought an action for a declaration (i) that clause 3 of the will and clause 1 of the codicil of Yeo Chiang Woo deceased were contrary to the rule against perpetuities and void for uncertainty and invalid at law and in equity; (ii) that the plaintiffs together with the other heirs at law are entitled to the distribution of the estate of the testator in accordance with section 17 of the Sarawak Administration of Estate Ordinance (Cap. 80).

The first plaintiff claimed that she was entitled to the estate as the widow of Yeo Jut Peng the son of the first widow of the testator. In clause 5 of his will the testator had declared that Yeo Jut Peng had no claim to his property or business. The second plaintiff claimed he was the adopted son of the first plaintiff. The issues before the court were *inter alia* (a) whether the rule against perpetuities applies to Sarawak and to properties in Sarawak; (b) whether the alleged adoption of the second plaintiff is valid; (c) whether the plaintiffs or either of them are heirs at law in the event of a partial intestacy.

Held: (1) the rule against perpetuities does not apply in Sarawak or to properties in Sarawak;

(2) there was no evidence to support the existence of an adoption as alleged by the second plaintiff;

(3) the first plaintiff was not entitled to any distributive share in the estate but was only entitled to maintenance; as the first plaintiff had no *locus standi* it followed that the claim of the second plaintiff must also fail.

Cases referred to:-

(1) *Tay Sok Ann* v. *Tay Sok Hiong* [1955] S.C.R. 17.

(2) *In re Estate of Arunasallam* [1947] S.C.R. 18.

(3) *Re Oosasang's Case* Kuching Civil Case No. C/115/60 (unreported).

(4) *Ting Ing Kee* v. *Teng Koh Eng* [1960] S.C.R. 61.

(5) *Chettiar* v. *Chettiar* [1935] A.C. 163.

(6) *Lam Kim Sang* v. *Cheang Kok Sang* [1929] S.S.L.R. 62.

(7) *Cunningham* v. *Foot* (1877-78) 3 App. Cas. 970.

(8) *Foo Sam Teck* v. *Probate Officer, Simanggang* [1960] S.C.R. 17.

(9) *Liaw* v. *Blikas* [1965] 2 M.L.J. 9.

CIVIL SUIT.

Daniell Tajem for the plaintiffs.

Patrick Tan for the defendant.

Cur. Adv. Vult.

B.T.H. Lee J.: This suit was brought by the plaintiffs and related to the estate of Yeo Chiang Woo otherwise known as Yeo Tiang Ewe (deceased) who died testate on 4th July, 1927 at Kuching with a will dated 29th June, 1927 and codicil dated 2nd July, 1927.

The original executors of the will were Tan Jee Moi (f) the first widow and Yeo Jut Hin (Heng) the

lawful son of the testator by his second widow, Tan Gek Lang.

Tan Jee Moi died intestate in China on 20th November, 1942 and Yeo Jut Hin (Heng) died intestate in Kuching on 27th April, 1936.

Tan Hui Kheng (f), the defendant is the lawful widow of Yeo Jut Hin and upon application to the Supreme Court in 1946 was appointed on 21st May, 1946 executrix to administer the remaining unadministered portion of the estate of the testator in accordance with the terms and conditions of the said will and to render bi-annual accounts to the Registrar of the Supreme Court. On 28th May, 1946, the Registrar Supreme Court as probate officer granted probate to the first defendant on those terms.

Lam Yet Hung (f), the first plaintiff claimed that she was entitled to the estate as the widow of Yeo Jut Peng the son of the first widow of the testator.

Yueng Kwai Fat, the second plaintiff claimed that he was the adopted son of the first plaintiff and that he was entitled to the estate. The second plaintiff is claiming through the first plaintiff.

It is convenient first to set out the relevant terms of the will and codicil of the testator.

Clause 3 reads as follows: —

"That Tan Jee Moi (i.e. the first widow) has no right to sell or mortgage the above house, property or the shares, but should make arrangements to pass on the property to the male grandchildren of my son Yeo Jut Heng when all of them attained their majority."

Clause 2 of the codicil is in the following terms: —

"An addition to clause 3 of the will. The grandsons of my sickly son Yeo Jut Peng have equal claim along with the grandsons of Yeo Jut Hin, on my property when they come of age."

Clauses 5 and 6 of the will and testatement provides: —

"5. That Yeo Jut Peng a sickly son of my legal wife Tan Jee Moi has no claim in the above property or business."

"6. That my son Yeo Jut Hin give before my funeral rites are performed a sum of ($200.00) Dollars two hundred only as a bonus to my sickly son Yeo Jut Peng (Straits currency)."

The properties of the estate affected by clause 3 of the will and codicil 1 are —

(a) Three parcels of land in Kuching Town Land District Lot 58 (shophouse No. 1, Market Street, Kuching), Lot 41 and Lot 57 (shophouses No. 1A and No. 1, Java Street, Kuching) all in Section 23.

(b) 91 shares in the Sarawak Steamship Co. Ltd.

The plaintiffs seek to obtain a declaration —

(i) that clause 3 of the will and clause 1 of the codicil are contrary to the rule against perpetuity and void for uncertainty and are invalid at law and in equity.

(ii) that the plaintiffs together with the other heirs-at-law be entitled to the distribution of all the estate of the testator in accordance with section 17 of the Sarawak Administration of Estate Ordinance (Cap. 80).

In addition, plaintiffs prayed for an order —

(i) removing the defendant as executrix and trustee of the estate,

(ii) appointing some other fit and proper persons as trustee in place of the defendant and vesting all the properties belonging to the said estate in the person so appointed,

(iii) for all necessary accounts and enquiries, all moneys received and profits made by the defendant out of and in respect of the assets of the said estate and for payment by the defendant of what may be found due to the plaintiffs upon taking such accounts, and

(iv) for the sale of the properties of the said estate and the winding up thereof.

Yueng Kwai Fat, aged 40 years by his evidence said that his permanent place of residence is at Lo Fu Ngam Mansion, 6th Floor, Kowloon City, Kowloon. He is the attorney of the first plaintiff.

He came to Kuching on 5th January 1967 and stayed in this town for 40 days.

Sometime in 1938 or 1939 he was adopted by Tan Jee Moi, the first widow of the testator as her adopted grandson. He was then 10 or 11 years old. Yeo Jut Peng his adoptive father had died in 1936 before he was adopted.

According to the second plaintiff Tan Jee Moi went through some form of ritual at which Lam Yet Hung, his adoptive mother and Yeo Yet Wee were present.

He claimed he has as adopted son discharged his duties to his ancestors, cleaning the tombs of the Yeo family and joining in family worship.

About the time when he was 12 or 13 years old his adoptive grandmother told him he was entitled to the family's inheritance consisting of 3 shophouses and 91 shares in a steamship company. They were to be divided among the grandchildren of Yeo Jut Peng and Yeo Jut Hin, who are brothers.

He came to Kuching and discussed with the defendant the estate of Yeo Chiang Woo (hereinafter referred to as 'the testator'). He admitted that he told the defendant she could keep all the property in Sarawak but it was her bounden duty to send maintenance to the first plaintiff. The defendant told him only grandchildren of Yeo Jut Peng and Yeo Jut Hin are entitled to the property but not the sons.

A discussion of some kind took place with the headmen of the Teochew Association and his elder uncle Yeo Juat Soo in Kuching.

The Assistant Public Trustee (PW2) confirmed that the defendant Tan Hui Kheng was appointed executrix of the estate on 21st May 1946 by order of the High Court.

Probate was granted to her on 28th May, 1946. He managed to salvage the records of the estate. The files were in a mess and have changed hands many times.

According to the record bi-annual accounts were submitted by the defendant in the years 1946 and 1947, but he has been unable to trace the accounts. There is no record of any account subsequent to the year 1947.

Tan Tsak Yu, the vice-chairman of Teochew Association (PW3) said the second plaintiff sought his assistance to arbitrate in this matter so that each party may share the proceeds derived from the property. They found themselves unable to agree.

An expert in Teochew custom, he said an adopted son is entitled to the property of the adoptive father. Normally adoptive sons and natural-born sons share in the inheritance of the family estate. In the absence of directions property is equally shared by the next-of-kin. A female issue is not entitled to a share of the property.

It is not unusual to adopt a son even after the death of the father to ensure the continuity of the family tree.

The most senior member of the family can adopt *e.g.* a grand mother. Usually a female issue has no share in the property except maintenance. He added a will disinheriting a son, is binding.

Tan Hui Kheng (DW1) 62 years of age the executrix of the estate of Yeo Chiang Woo said that Yeo Chiang Woo was her father-in-law.

Tan Jee Moi and Yeo Jut Hin (defendant's husband) were appointed executrix and executor of the will of the testator. She has 4 sons and 2 daughters as well as 6 grandchildren. Her husband died sometime in 1936.

Ever since she became executrix she rendered accounts to the probate officer for 8 years. According to her after the eighth year the probate officer told her most of the documents were destroyed by white ants, and it was not necessary to submit accounts any further as she was a woman. This was in 1953. No information about submitting accounts to the probate officer has been received by her since that time.

Tan Jee Moi, her mother in law died in 1942. It was then that she learned that the second plaintiff was adopted for Yeo Jut Peng.

She maintained that according to the terms of the will only great grandsons have a claim to the estate, not the grandsons.

Her father-in-law had during his life time found nothing to commend in the conduct of Yeo Jut Peng the alleged adoptive father of the second plaintiff.

She denied she ever signed any of the letters read out by counsel for plaintiff. Someone else could have written them using her name.

The issues before the court are: —

(1) Whether the alleged adoption of second plaintiff is valid.

(2) Does the rule against perpetuity apply to Sarawak and to properties in Sarawak. If so, notwithstanding the application of the rule, whether the declaration of the testator under clause 3 of the will and codicil 1 thereto is valid or invalid in respect of a Chinese estate.

(3) Are the plaintiffs or either of them heirs-at-law in the event of a partial intestacy. If so, are they or either of them entitled to share in the estate having regard to the terms of the will.

(4) whether the claim of the plaintiff are
   (a) barred by provisions of the Limitation Ordinance (Item 99)
   (b) barred by laches and acquiescence.

(5) whether the court has jurisdiction to entertain the claim having regard to —
   (a) the provisions of the Administration of Estate Ordinance and Court of Judicature Act, 1964,
   (b) the absence of caveat and citation to bring in grant.

(6) whether the finding and ruling of the court in Originating Summons No. K. 22 of 1967 operates as *res judicata.*

I will first deal with the question whether clause 3 infringes the rule against perpetuities.

The question involved is whether such a rule affects a Chinese estate in Sarawak, or whether it applied to Sarawak and to properties in Sarawak.

Halsbury's Laws of England Vol. 29 at page 299 has this to say.

"The rule against perpetuities does not apply to immovable estate in Scotland or foreign countries. . . . ."

Sarawak became a British Colony pursuant to various Orders-in-Council in 1947. She ceased to be a Colony in 1963.

It follows that at the time of death of the testator in 1927 when action was brought Sarawak was not a British Colony of which fact the court can take judicial notice.

Halsbury Vol. 29 at page 290 refers to the rule being applicable —

"to all private properties proprietory right in which are governed directly by or by reference to the law of England including property in colonies into which that law has been introduced."

Even assuming that Sarawak is a Colony (as, in my opinion it is not) such rule cannot be made applicable to Sarawak because the Application of Laws Ordinance (Cap. 2) by section 2 specifically excludes its application where there is an existing local law or custom dealing with the matter.

Our local law dealing with the proprietory rights in land is the Sarawak Land Code (Cap. 81) and its predecessor the Land Ordinance and Land Settlement Ordinance.

This view of the matter is further supported by *Tay Sok Ann* v. *Tay Sok Hiong*[1] where Blagden Ag. J. said at page 20.

"In my view, as this is a Chinese estate, any proved or accepted Chinese custom in Sarawak should prevail over English law. This is apparent from the proviso to section 2 of the Application of Laws Ordinance (No. 27 of 1949)."

and further down he said —

"Although the will of Tay Lim Tiang has been declared invalid, nevertheless its existence as a document of record is clear evidence of the wishes of the deceased. . . ."

In other words, it clearly excludes the application of the English rule against perpetuities.

Counsel for plaintiffs argued to the contrary and relied on *In re Estate of Arunasallam*[2] where it was held by the Supreme Court, Kuching that the rule against perpetuities applied to certain legacies and the devise was held to be void.

We are here dealing with a Chinese estate and I think the case of *Tay Sok Ann* lays down the law on the subject. I am not aware that it has ever since been overruled or seriously called in question.

My attention was directed to *Re Oasasang's*[3] case. I have called for the file Kuching Civil Case No. C/115/60 *Re Oasasang.* That was an application by way of *Ex Parte* Summons in Chambers for an order

for the sale of land. I do not find anything in this case which can be of assistance to the court.

I should record at this point that grant of probate to the first executors namely Tan Jee Moi (f) and Yeo Jut Heng was made on 15th August, 1927 (that is about 41 years ago) and the later grant to the defendant on 28th May, 1946 (about 22 years since) to administer the remaining unadministered portion of the estate which concerned the very subject matter now before the court. And until they took steps to have the grants set aside, they are bound by them.

In so far as posthumous adoptions and adoptions effected outside the State of Sarawak is concerned, I think the authorities cited go to show that they are recognised in Sarawak provided there is sufficient evidence to support such an adoption.

I now turn to the crucial issue in these proceedings, namely the status of the plaintiffs.

It is clear that the claims of the plaintiffs depend upon the status of Yeo Jut Peng (called for brevity "YJP"), because the first plaintiff claims through him as the widow and the second plaintiff on his part claims through the first plaintiff.

It was the case of the second plaintiff that he was adopted in China by Tan Jee Moi (f).

Counsel for the plaintiffs frankly admitted that his clients have subpoenaed Yeo Jut Soo (a devisee in the testator's will), the alleged uncle of the second plaintiff who is in Kuching to give supporting evidence on his behalf, but Yeo Jut Soo has declined to do so.

It was also pointed out that one of the witnesses to the will and codicil is still alive in Kuching, but no attempt was made to call him by the plaintiffs.

It was urged by counsel for the defendant that because of the failure on the part of the second plaintiff to call witnesses (whether in China or in Sarawak) to prove facts which he asserts knowing the onus of proof thereof rests on him, it is clear that the court must decide the question in favour of the defendant.

In the absence of some kind of instrument executed in pursuance of the adoption in China, much better evidence could have been put forward if the claims were true.

After weighing the probabilities, I came to the conclusion that there really was no evidence before the court capable of supporting the existence of an adoption as alleged by the second plaintiff.

Now under the terms of the will of the testator YJP was expressly disinherited.

Clause 5 of the will reads as follows: —

"5. That Yeo Jut Peng a sickly son of my legal wife Tan Jee Moi has no claim in the above property or business."

Under clause 6 of the will YJP was entitled to $200 "as a bonus" and the money was duly paid to him.

It is true that hearsay evidence is not inadmissible when it is proposed to establish by the evidence not the truth of the statement, but the fact that it was made.

The testator's reaction is in my opinion consistent with the testimony of the defendant.

YJP's course of conduct as narrated by the testator to the defendant must have been so grave and weighty and of a reprehensible character as to amount to unfiliality and to cause the testator to translate his intention into clause 5 of the will and thus to disinherit YJP.

If YJP had no more claim against the estate it follows that the first plaintiff the widow has no claim nor has the second plaintiff.

A testator can make a verbal declaration of disinheritance and it is binding. Reference is made to *Tay Sok Ann's* case, where the learned judge said at page 20:

"I am satisfied that there is accepted Chinese custom in Sarawak relating to the descent of property on an intestacy, and that custom is that the property of the deceased is divided equally between his sons, who became responsible for the support of their mother until her death and their sisters until their marriage or earlier death.

But at the same time a son, or sons, can be disinherited either partialy or totally under this custom by a public declaration made by the deceased in the presence of the elders of his clan and assented to by them."

Mr. Tan Tsak Yu, (PW3) a witness for the plaintiffs had testified to the fact that if the words of disinheritance were written in the will, then the act of disinheritance was conclusive and cannot be challenged.

Now subordinate to this aspect is the question whether the first plaintiff is an heir to the testator.

Again, in *Tay Sok Ann's* case the court had held that in accordance with accepted Chinese custom in Sarawak the property of the deceased is divided equally among his sons and the son's mothers and sisters are entitled to maintenance only and not a distributive share in the estate.

PW3 also admitted that the widow in this case would be entitled to maintenance only.

This is also confirmed in the booklet *"Chinese Family Law"* published by the Chinese Secretariat, Sarawak Government, in 1955 at page 13 —

"No female Inheritance"

In China there is no inheritance through a female. Directly a woman is married she is in popular language said 'to go out of the door', and she then ceases to belong to her father's family.

In China there are practically no unmarried women, so that they are always dependent upon either her father, her husband, or her son: in a way, women in China may be said to exist more as appendages to men then as independent female units.

and also at page 25 —

"Widow of an intestate — The widow of an intestate has no right to a share in the family property, but the sons are bound to support her according to her station in life, and the widow is entitled to a controlling voice in the management and preservation of the property of the deceased".

I should mention that Lam Yet Hung (f) the first plaintiff is the widow of YJP (who was disinherited by the testator) and not the widow of the deceased testator.

Strictly speaking, she does not come within the category of persons entitled and as such has no right to claim at all.

Even granting that she was the widow of the testator she would only be entitled to maintenance and not to claim a distributive share in the estate.

If the first plaintiff has no *locus standi*, it must I think follow that the second plaintiff must also fail.

It is in evidence that the second plaintiff claimed to have a share in the estate by virtue of his adoption as the adopted son of YJP.

It is also in evidence that YJP had died when the alleged adoption was alleged to have taken place.

It is quite proper in the circumstances for an adoption in the case to perpetuate the family tree of YJP and it was not to perpetuate the name of the branch of the testator who had another son.

It is perhaps useful to quote the following from *Chinese Creeds and Customs by V. R. Burkhart (1954)* where the learned author said at page 174:

"In the case of failure to produce the desired heir, adoption is frequent."

and at page 175:

"should a man die, over the age of sixteen, without heirs to carry out the ancestral worship, a child may be adopted by his family and recognised as his son, and lawful successor."

It is quite possible to conceive that the second plaintiff might have a claim against the estate of YJP, but not, in my opinion, in respect of the estate of the testator.

The onus of proof lay on them to show, by the ordinary standard of proof in civil actions, that on a balance of probabilities they were so entitled.

There is also nothing in the evidence before me capable of supporting the existence of an adoption such as is recognised in Chinese customary law.

The next question is whether the plaintiffs are disentitled by lapse of time from maintaining the proceedings.

Item 99 of the Limitation Ordinance is as follows: —

Description of Suit	*Period of Limitation*	*Time from which period begins to run*
99. For a legacy or for a share of a residue bequeathed by a testator, or for a distributive share of the property of an intestate.	Twelve years.	When the legacy or share becomes payable or deliverable.

In this connection it would be convenient to refer to section 17 of the Administration of Estate Ordinance (Cap. 80) which provides as follows: —

"17. On obtaining probate or letters of administration the executor or administrator, as the case may be, shall *forthwith* —

(a) ...

(b) ...

(c) distribute the residue of the estate among the beneficiaries or heirs of the deceased, according to the will of the deceased or, as the case may be, in the shares to which they are entitled by recognised law or custom...."

In other words the legacy or share becomes payable or deliverable within a reasonable time upon the grant of probate, that is, to say on 15 August 1927, or upon second grant to the defendant on 28 July 1946.

There was no allegation of fraud of any sort nor was it pleaded that the defendant is an express trustee in whom the property has become vested in trust for a specific purpose.

The object of the plaintiff's suit before the court is to seek a ruling that clause 3 of the will and codicil 1 thereof (which might be regarded as a specific instruction by the testator) are void.

This part of the case has caused me considerable difficulty. This much however is plain. Nowhere is it pleaded that the defendant is an express trustee in whom the property has become vested for a specific purpose and therefore caught by section 9 of Limitation Ordinance which reads:

"Notwithstanding anything contained in sections 3 to 8 inclusive, no suit against a person in whom property has become vested in trust for a specific purpose, or against his legal representatives or assigns, not being assigns for valuable consideration, for the purpose of following in his or their hands such property, shall be barred by any length of time."

So whatever semblance of express trust there may be is to qoute counsel for defendant destroyed by the plaintiffs' action.

In the view I take of the matter it is not necessary to consider the authorities cited *e.g. Ting Ing Kee* v. *Teng Kah Eng;*[4] *Chettiar* v. *Chettiar;*[5] *Lam Kim Sang* v. *Cheang Kok Sang*[6] and *Cunningham* v. *Foot*[7] cited by counsel.

There were various references in the submission as to matters which were dealt with in the correspondence but apparently no attempt was made by counsel for the plaintiffs to cross-examine the defendant on any of them.

The letters and in particular Exhibit 28 are not in my opinion admissible in evidence there being no proof that they were written by the defendant who has denied any knowledge of them. Nobody was ever called to show where or how these documents came from. Certainly no attempt was made to show that they were written by the defendant.

This takes us to the question as to the jurisdiction of the court.

The plaintiffs here seek for an order to remove the defendant as executrix of the estate and to appoint some fit and proper person to take her place.

Returning to the grant of probate it will be recalled that the grant by the probate officer was made in accordance with the provisions of the Administration of Estate Ordinance of Sarawak (Cap. 80).

True, in a proper case *certiorari* would lie to remove to the High Court the proceedings of a probate officer under the same Ordinance (see *Foo Sam Tek* v. *Probate Officer, Simanggang*[8]). This was not done.

Quite clearly there appears to be a failure on the part of the plaintiffs not having first adopted the

course which was open to them of applying to the probate officer for the revocation of the grant (see *Liaw* v. *Blikas*[9]).

The defendant alleged that she had submitted her accounts regularly as requested by the court to the probate officer until 1953 when the probate officer told her not to do so.

The Public Trustee (DW1) informed the court that the files in respect of the estate were in a mess and the true position cannot be ascertained.

In my judgment as the right to vary is nowhere expressly conferred to the probate officer by law, no one has a power to vary the order of the court.

However, I find it unnecessary to decide the other points raised as I have reached a conclusion in the defendant's favour on other grounds.

For these reasons, I find in favour of the defendant with costs.

Judgment accordingly.

AMERICAN INTERNATIONAL ASSURANCE CO. LTD. v. UNION BUILDERS (MALAYSIA) SDN. BHD.

[F.C. (Ong C. J. (Malaya), Gill and Ali FJJ.) May 19, 1971]

[Kuala Lumpur — Federal Court Civil Appeal No. 18 of 1971]

Land Law — Charge — Default in payment of instalments and interest — Notice of default in Form 16D — Order for sale — Rate of interest from date of order to date of payment — National Land Code, s. 242 and 254.

The appellant in this case were the chargees of certain lands on the security of which the respondent was given a loan of $1,250,000 bearing interest at 11% per annum. The respondent defaulted in payment of a number of instalments and interest and notice of default was given as in form 16D under section 294 of the National Land Code. Subsequently an order for the sale of the lands was made by the High Court to recover the sum of $1,401,596.24 due to the appellants as on the August 31, 1970, together with interest at the rate of 11% per annum from September 1, 1970, to the date of order and further interest at the rate of 6% per annum to the date of payment or realization. The appellants appealed against the order of the High Court in so far as it related to the payment of interest at 6% from the date of the order. They claimed the payment of full interest at 11% until date of realization of the security. The respondent cross-appealed on the ground that the notice of default in Form 16D was bad in law.

Held: (1) as the appellant's claim as chargees in this case was not on the covenant but in exercise of their statutory remedy against a chargor in default there could not be any merger in the judgment and the appellants were therefore entitled to interest at the agreed rate, that is, 11% until realization of the security;

(2) the notice in form 16D was valid.

Cases referred to:-

(1) *Ex parte Fewings* [1883] 25 Ch. D. 338, 355.

(2) *Economic Life Assurance Society* v. *Usborne* [1902] A.C. 147, 149.

(3) *Mary Michael* v. *United Malayan Banking Corporation Ltd.* [1971] 1 M.L.J. 172.

FEDERAL COURT.

K. Thayalan for the appellants.

Edward T. T. Lim for the respondents.

Ong C.J. (Malaya): The appellants are the chargees of certain lands on the security whereof the chargor was given a loan of $1,250,000 bearing interest at 11 per cent per annum. The charge was effected by an instrument in Form 16A, under section 242 of the National Land Code. The chargor defaulted in the payment of a number of instalments, as well as interest. Notice of default was duly given as in Form 16D under section 254. On February 18, 1971 an order was made by the High Court at Kuala Lumpur for the sale of the lands comprised in the charge to recover the sum of $1,401,596.24 due to the chargees as on August 31, 1970 together with interest thereon at the rate of 11 per cent per annum from September 1, 1970 to the date of order and further interest thereafter at the rate of 6 per cent per annum to the date of payment or realisation. By the same order of court the public auction was fixed for May 15, 1971 and other directions relating to the sale left to be settled by the Senior Assistant Registrar. The chargees' costs were to be taxed as between solicitor and client.

The chargees have appealed against that decision in so far as it relates to the payment of interest at 6 per cent from the date of the order. Their claim is for full interest at 11 per cent until date of realisation of their security.

The chargor has also cross-appealed on the ground that the Notice of Default in Form 16D was bad in law. It is also contended that the judge should have exercised his discretion by ordering that the costs be taxed as between party and party instead of solicitor and client.

As regards the appeal by the chargees, I must say, with all respect, that I think it should be allowed. In awarding the lesser interest from the date of his order, the judge purported to follow the judgment of Fry L.J. in *Ex parte Fewings*[1] as follows: —

"When there is a covenant for the payment of a principal sum, and a judgment has been obtained upon the covenant for that sum, it is plain that the covenant is merged in the judgment, and, if there is a covenant to pay interest which is merely incidental to the covenant to pay the principal debt, that covenant also is merged in a judgment on the covenant to pay the principal debt. Of course a covenant to pay interest may be so expressed as not to merge in a judgment for the principal; for instance, if it was a covenant to pay interest so long as any part of the principal should remain due either on the covenant or on a judgment."

The passage above was quoted with approval by the Earl of Halsbury L.C. in *Economic Life Assurance Society* v. *Usborne*[2] but, read by itself, it did not, perhaps, sufficiently clarify the distinction between a judgment given on a simple claim for a debt and a claim upon a mortgage. As Lord Davey said (on pages 152 and 154) in the same case: —

"... when a judgment is recovered in respect of a debt any other personal remedy for the same debt is extinguished or merged in the judgment.... (But) once come to the conclusion that the mortgage is in such a form that the property mortgaged cannot be taken out of the hands of the mortgagee without payment of the principal and full interest, then the covenant has no more to do with it than if it related to another subject-matter altogether."